IN THE

Supreme Court of the United States

October Term 1971

No. 71-641

CONCHITA ESCOBAR,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Orange.

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Statement of the Case.

California Penal Code Sections 11225-11230 otherwise known as the Red Light Abatement Act provide for the abatement as nuisances of places where acts of "lewdness, assignation, or prostitution" are held to occur. The statutes upon the finding that a nuisance does exist provide for the granting of preliminary injunction, final injunction and for the closing of the premises for one year.

On or about May 2, 1969, pursuant to California Penal Code Sections 11225-11230, a complaint seeking a preliminary injunction and abatement of the nuisance was filed in the Superior Court of Orange County, California, in a case entitled "*The People of the State of California vs. the 'Vampire Room'*," Conchita Escobar, *et al.*, No. 16675. The motion for

preliminary injunctive relief was heard on affidavits, which showed that during early 1969 while Conchita Escobar was owner and manager of the beer bar known as the "Vampire Room", and that the bar has a small stage set at eye level with the patrons which is and was in effect an extension of the area on which patrons placed their beer glasses. The affidavits also show that during the period of several months naked dancers had been performing simulated acts of intercourse within two feet (and sometimes inches) of the patrons' faces. On several occasions the so-called dancers had gone much further. For example, Affiant Taylor reported that on April 3, 1969, the dancer:

> With her legs spread wide apart, she moved her pubic area to within a foot of Anderson's face. We then observed Anderson rise slightly out of his seat and move his head in between Kyseck's legs. She moved slightly away from him, but then, almost immediately, moved back towards him. Anderson then moved his face back between her spread legs, and we observed him place his mouth on the bikini pants directly over Kyseck's pubic area. They maintained this position for two or three seconds before Anderson sat back in his seat and Kyseck moved away. She then moved four seats north of Anderson's location, and went into the same position in front of Terry Royce Parker. Parker was observed to place his head between Kyseck's legs and make contact between his mouth and Kyseck's pantie-covered pubic area. This contact was maintained for approximately three or four seconds.

Affiant, Mrs. Roe reported that on April 2, 1969, the dancer went into a position "where she bent over

backwards and held herself a few inches off the floor with her hands and legs. . . . She spread her legs . . . one of the customers leaned forward and placed his head between the dancer's thighs and the dancer then closed her legs on his head and held him in that position" moving her hips in an undulating manner.

Affiant Griffeth reported that on March 25, 1969, the dancer:

> . . . with legs spread apart, lowered her body and extended her pubic area while gesturing for Jackson to move forward. At this time Jackson rose from his seat and with both hands extended for body support against the bar fixture, moved his face to direct contact with the pelvic area of Moore. He was observed to hold his head in an almost motionless state while Moore gyrated her body causing contact between the facial area of Jackson and the pubic and inner-thigh area of Moore.

Affiant Gier stated that on April 24, 1969, he observed the naked dancer to hold a beer glass between her breasts and patrons to drop money in it.

The above incidents are merely samples of a rather numerous variety of lewd acts shown by the affidavits to have been committed over a period of two months. After hearing, the Superior Court of Orange County issued the preliminary injunction requested by the People. Before the case went to trial, however, Conchita Escobar, advised and accompanied by her attorney, sought to avoid trial on the merits and entered into a stipulation, prepared by her attorney of record, in which on behalf of herself and of the "Vampire Room" of which she was the licensee, she agreed to

have the preliminary injunction become permanent on condition that the People would dismiss that part of the complaint requesting closure of the premises pursuant to the Red Light Abatement Act (See Respondent's Attachment A). The stipulation was prepared by Petitioner's Counsel (See Respondent's Attachment A) and the Order of the Court (See Respondent's Attachment B), also prepared by Petitioner's counsel, signed on June 27, 1969, and entered on June 30, 1969, reads as follows:

Order.

GOOD CAUSE APPEARING THEREFORE:

IT IS HEREBY ORDERED that CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted to be conducted therein as part of the business operations the so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region, whether real or simulated, are not completely covered by material which cannot be seen through by the nearest spectator.

IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

DATED: 6-27, 1969

(SGD.) CLAUDE M. OWEN
JUDGE OF THE SUPERIOR COURT

On December 18, 1970, a "Declaration of Contempt for Violation of Permanent Injunction" was brought by the People of the State of California against Conchita Escobar in that on December 7, 1970, with full knowledge of the Order, while in full control of the Vampire Room Bar and able to comply with the Order since she was present at the exhibition, she allowed Monette McCall to do the following acts:

> Miss McCall was lying on the carpet and I noted that she had manipulated her G string in such a manner that it was pulled inside both the labia majora and the labia minora. Her pubic area was clearly visible and appeared to have been shaved. As she lie on the runway, music was playing, however she did not appear to be moving in time with the music, nor paying any particular attention to it.
>
> As I observed, she took a position so that her legs were pointed in my direction and she then began to knead her breasts with her hands, inverting the nipples with her index finger, etc. She then lied back on the carpeting and spread her legs and reached down with her hands and pulled her vulva open. I was able to clearly see anal aperture as well as the vaginal opening, clitoris, etc.
>
> She then moved across the stage and appeared to repeat the same motion in front of other customers.

The Superior Court of Orange County after due hearing found Conchita Escobar guilty of contempt.

Questions Presented.

I. *Whether the Federal Courts have jurisdiction to review state actions abating a nuisance.*

II. *Whether a petitioner who has stipulated to a judgment of injunction can attack its validity.*

III. *Whether the California "Red Light Abatement Act" upon which the order of injunction rests is unconstitutional as applied because in violation of Petitioner's First Amendment rights.*

IV. *Whether the order of injunction is unconstitutionally broad.*

ARGUMENT.

I.

Federal Courts Have No Jurisdiction Over Error in Rulings Upon Matters in Abatement.

Respondent submits that the jurisdiction of This Honorable Court in this case is limited by 28 U.S.C. §2105 which states:

> There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

II.

A Petitioner Who Has Stipulated to a Judgment of Injunction as Part of a Bargain Cannot Attack the Validity of the Stipulated Order.

Whether in a civil suit or in a criminal proceeding, California law has always respected a bargain made by the parties and cases have held that a party to the bargain cannot later complain because of its existence. Thus in *Estate of Bliss*, 199 Cal.App.2d 630, 641, the California Court states:

> Further, defendant is not in a position to complain of the consolidation because a written stipulation (executed on behalf of plaintiffs and defendant) that the equity action and the contest "be consolidated for the purpose of trial only" was filed in both causes and the order was made pursuant thereto.

In *Atchison, T. & S.F. Ry. Co. v. Hildebrand*, 238 Cal.App.2d 859, as in the case at hand, appellants had entered into a stipulation permitting the court to enter a Consent decree for an injunction against them.

After judgment was so entered, the appeal followed. In dismissing the appeal the Court stated:

> It is, of course, an elementary rule of appellate procedure that a judgment or order will not be disturbed on an appeal prosecuted by a party who consented to it. (*Adams v. Southern Pacific Co.*, 109 Cal.App. 728, 731 [293 P. 681], [citations].) A stipulation such as the one at bench is a consent within the meaning of this rule. (*Brooms v. Brooms, supra,* at p. 352.)

Moreover, from a practical standpoint the determination of validity of the California statute as applied, sought by Petitioner would be impossible. The action brought was, in fact, an action in abatement. The scope of the Order of the Court thus can only be evaluated in terms of whether it is germane to the abatement of the nuisance complained of and in light of the evidence showing the existence and the type of nuisance involved. As stated in *People v. Hawley,* 207 Cal. 391, 400:

> . . . appellants contend that the sole power given by the court in such an action is to abate a public nuisance, and that it confers no power upon the court to issue an injunction. It is true that this section of the code refers only to an action brought "to abate a public nuisance," but it is often, and we might say generally, necessary in order to abate a nuisance to direct that those guilty of maintaining the same be enjoined from doing certain acts, which, if done, would amount to a continuance or maintenance of such nuisance.

That Court went on to conclude:

> . . . We are satisfied that the court in said action had the power to issue an injunction restraining the defendants from the commission of any act or acts which the evidence showed *would contribute to* or result in the maintenance or creation of the nuisance complained of.

The test of validity, therefore, is not in terms of whether the acts enjoined are, or are not constitutionally legal, but rather it is whether they are designed to *prevent* the continued existence or reoccurrence of the nuisance complained of.

Where as in the case at hand a consent judgment of injunction is entered without hearing, there is no factual evidence of what the nuisance consisted of and thus no facts from which to test the validity of the terms of the injunction.

Moreover, in the case under submission the Petitioner, in consideration of Respondent's dismissal of part of the prayer for relief, stipulated that the People should be awarded a permanent injunction to abate the nuisance described in the complaint. In so doing, it is submitted, Petitioner agreed that the permanent injunction was suitable, proper, *and* necessary to abate the nuisance and he is now precluded from contradicting himself by California Evidence Code §623 which states:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

In accord with the above principles the Court in *In re Halliman,* 126 Cal.App. 121, 127, went on to say:

> . . . it is held generally that a stipulation made in open court as this one was "constitutes not only an agreement between them and the court, which the latter is bound to enforce . . ." (23 Cal. Jur. 811); and even though a party after entering into a stipulation is allowed under certain circumstances to withdraw therefrom, it does not appear that petitioner ever asked permission so to do. Therefore, so far as the record before us shows, the trial court did not exceed its jurisdiction in seeking to enforce as against petitioner the stipulation theretofore made by him.

In the case at hand, the Petitioner admitted that a nuisance existed under the Red Light Abatement Act and *agreed* not to do certain things which *he agreed* would contribute to the nuisance. Those facts must, therefore, be taken as true and even though the prohibited conduct were as legal as digging in one's own backyard, the Court has the jurisdiction and the power to enforce the permanent injunction to which Petitioner has stipulated. Moreover, *Associated Lbr. etc. Co. v. Superior Court,* 79 Cal.App.2d 577, clearly shows that, once an order of injunction is final and no appeal is pending, under California law the sole issue before the reviewing Court is to ascertain whether the trial court acted within its jurisdiction in rendering judgment in the contempt proceeding. It is there stated:

> On certiorari a reviewing court may not weigh the evidence upon which the petitioner has been

> found by a trial court to be guilty of contempt, except for the purpose of determining jurisdiction. Its sole province is to determine from the record whether the trial court acted within its jurisdiction in rendering judgment in the contempt proceeding.

What is before this Honorable Court, therefore, is the contemptous disregard of an order made by a court having both jurisdiction over the parties and over the subject matter and clearly valid and enforceable under California Law. This Court in *Walker v. Birmingham*, 388 U.S. 307, 18 L.Ed.2d 1210, 1216, has stated:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished." 258 U.S., at 189-190, 66 L.Ed. at 559.

Here as in that case no efforts were made to have the order modified or vacated, and here as in that case Petitioner has failed to show a right to relief by This Honorable Court.

III.

The California "Red Light Abatement Act" Is Not Unconstitutional on Its Face.

Several states have declared a place where lewd acts are committed to be a nuisance and have allowed the abatement of such places. For example, in *Evans Theater Corporation v. Slaton*, 180 S.E.2d 712, 715, *cert. den.*, 92 S.Ct. 281, the Georgia Supreme Court upheld the use of a nuisance statute to enjoin the showing of allegedly lewd movies. That Court points out:

> The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. § 26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.

That Court emphatically concluded:

> . . . it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance

> of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws.

Similarly, in *Grove Press, Inc., v. Flask*, 326 F. Supp. 574 the Court considered a statutory scheme for the abatement of nuisances and found the statutes to be constitutional both on their faces and as applied. The Federal District Court there goes on to say:

> The primary contention of plaintiffs is that the Ohio nuisance laws are unconstitutional on their face and as applied to the regulation of obscene matter. Ohio Revised Code §§ 3767.01-3767.11.
>
> The Ohio Revised Code establishes a statutory scheme for the regulation of nuisances, including places in which lewd or obscene films are exhibited. It provides for temporary injunctive relief upon application and after a hearing within ten days after filing of a suit. It also permits a judge to "issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place. * * *" And if the material is found to be obscene after a trial, a permanent injunction may issue. Further, certain penal provisions may apply: including, the levying of special taxes and liens; the voiding of leases; and the closing of places where nuisances are committed for up to one year, subject to cer-

tain ameliorating or modifying provisions including the "good faith" of the owner of the place. O.R.C. § 3767.01-11.

That Court concludes:

> We must assume "that state courts and prosecutors will observe constitutional limitations as expounded by [the United States Supreme] Court" . . . .
>
> While a nuisance statute is admittedly an imprecise tool with which to administer the regulation of obscenity, the definition of "lewd, indecent, lascivious or obscene films", contained within the statute does not, in the words of *Roth*, "offend the constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited." 354 U.S. at 492, 77 S.Ct. at 1313. The Ohio statutes are not overly broad.

The arguments made by the above cases are particularly appropriate where as here, the "lewdness" consists of conduct which is at best symbolic speech. Additionally it is submitted that application of the nuisance statutes is particularly suited to the furtherance of the "pandering" and "selective suppression of obscenity" concepts which form the basis for this Court's decisions in *A Book v. Attorney General*, 383 U.S. 413, 16 L.Ed.2d 1; *Ginzburg v. United States*, 383 U.S. 463, 16 L.Ed.2d 31 and *Mishkin v. New York*, 383 U.S. 503, 16 L.Ed.2d 56, since the "Abatement" does not suppress the material *per se* but only prohibits it within a specific set of factual circumstances.

IV.

The Red Light Abatement Act as Applied Through the Order of Injunction to the Conduct Involved Herein Does Not Violate Any of Petitioner's Rights.

(A) The Order Is Aimed at Action, Not at Speech.

The Order in question is not aimed at what is said but at what is done. It thus aims at regulation—not at suppression.

The power of the state to regulate conduct, even in the important area of free speech, has never been questioned. For example, advertising is a mode of expression, but *Railway Express Agency v. New York*, 336 U.S. 106 (1949), approved of an ordinance limiting advertising on public conveyances. The right to assemble is also a First Amendment right, but *Feiner v. New York*, 340 U.S. 315, shows that the right cannot be freely indulged into in *all* places. The right to freely express and advocate opinion or ideas is at the very core of the First Amendment, but *Kovacs v. Cooper*, 336 U.S. 77, clearly shows that the state may regulate by prohibiting the use of sound trucks.

In light of constitutional history, the regulatory power of the state is unquestionable as it is unquestionable that certain forms of expression (to wit: political and religious) stand higher in the scale of importance than do others (advertising or dancing, for example). Reading of the Order shows that what is here prohibited is the nakedness of certain parts of the anatomy in a particular place. Petitioner's hue and cry is that "Nudity *per se* is protected by the First Amendment."

Respondent submits that nudity *per se* is not protected by the First Amendment and becomes protected

only when it is an "expression" of some idea, *i.e.*, when it becomes an act of *symbolic* speech. *In Re Giannini*, 69 Cal.2d 563, did not say, as has been contended, that *nudity* is a form of expression but that the *dance* is a form of expression and that nudity integral to it could not be suppressed when it is *integral* to it.

To elucidate further: A photograph depicting a dog is a form of expression and is protected, as are photographs depicting pigs, jackals, or the naked female. But does it follow that *the* depicted dog, pigs, jackals, and naked females are protected by the First Amendment? A naked marble statute is a form of expression, but is the marble protected before the work begins? Clearly not. Nudity, therefore, is *not per se* cloaked with First Amendment protection and is only entitled to protection when it is found in the context of a performance.

Even assuming the conduct here involved to be within the scope of a performance, the prohibition of the Order goes not to the performance itself but to the element of "nakedness" contained within the performance. But "nakedness" must be classed as "symbolic speech," not as speech proper, and in recent years This Honorable Court has set a different test for the protection of "symbolic speech" than it has for speech proper. *United States v. O'Brien*, 391 U.S. 367, 377, sets forth the test. There This Honorable Court refused to strike down a statute which prohibited the burning of draft cards, and stated:

> O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amend-

ment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft. . . ."

We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. . . . We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

In applying the concepts set forth in *O'Brien*. The Court has upheld conduct which was *per se* innocuous while condemning conduct conducive to disruption.

Thus, for example, while declaring that the wearing of armbands by students was "symbolic free speech" within the protection of the First Amendment (see *Tinker v. Des Moines Independent Community School District*, 89 S.Ct. 733). this same Court did not hesitate to allow regulation of similar conduct under cir-

cumstances where the conduct might be conducive to disruption (*Cf. e.g. Cox v. Louisiana*, 379 U.S. 536, 555).

Moreover, it rarely has been suggested that constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute (*Cf. Gibony v. Empire Storage Co.*, 336 U.S. 490; and *Street v. New York*, 89 S.Ct. 1354, where the court distinguishes between the "symbolic act" of burning a flag and spoken words).

In another field involving far more important First Amendment rights than the one now under consideration, the Supreme Court, in differentiating between absolute prohibition and *regulation* of conduct in *Cameron v. Johnson*, 390 U.S. 611, 617, 88 S.Ct. 1335, 1338, 1339, has stated:

> The argument centers on the fact that the proscription of the statute embraces picketing employed as a vehicle for constitutionally protected protest. But "picketing and parading [are] subject to regulation even though intertwined with expression and association," *Cox v. State of Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487, and this statute does not prohibit picketing so intertwined unless engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from the courthouse. Prohibition of conduct which has this effect . . . does not abridge constitutional liberty "since such activity bears no necessary relationship to the freedom to * * * distribute information or opinion." *Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155. The statute is therefore

> "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society * * * the fact that free speech is intermingled with such conduct does not bring it within constitutional protection." *Cox v. State of Louisiana, supra,* 379 U.S. at 564, 85 S.Ct. at 481.

It is thus clear from the above that *conduct, i.e.,* symbolic speech can be *controlled* even if it cannot be suppressed. Accordingly, an Order controlling a nuisance by controlling such conduct does not run afoul of the First Amendment prohibition.

Where, as here, the element of "nakedness" does not seriously hinder the market place of ideas, the Order cannot be struck down. And Respondent submits that the performer is not less of a performer because of lack of adequate clothing on her body. Nor is nudity a necessary attribute of the form of expression called go-go dancing. It is thus a separate adjective that can be separately prohibited without running afoul of the First Amendment.

> And since such activity bears no necessary relationship to the freedom to distribute information or opinion, (its) prohibition does not abridge constitutional liberty, *Schneider v. State,* 308 U.S. 147; *Cameron v. Johnson,* 390 U.S. 611, 88 S.Ct. 1335.

As *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, states:

> We cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.

Additionally, Respondent submits that not only is protection of nudity not proper First Amendment protection, but also that the prohibition of nude appearances does not in any way "contract the spectrum of knowledge" (see *Martin v. City of Struders*, 319 U.S. 141) so as to *require* First Amendment protection. As Justice Douglas has said:

> No one would suggest that the first amendment permits nudity in public places. *Roth v. United States*, 354 U.S. 476, 512.

Accordingly, Respondent submits that an Order merely regulating such conduct cannot be considered unconstitutional on its face.

(B) Statutory Prohibitions Against Nudity in Public Places Have Been Found to Be Constitutionally Within the Power of the State.

In the recent case of *City of Portland v. Derrington*, (Oregon) (1968) 451 P.2d 111, *cert. den.* November 17, 1969, the issue involved a city ordinance proscribing the exhibition of one or both female breasts in any place where food or alcoholic beverage was offered for consumption on the premises by the public.

That Court in upholding the validity of the ordinance pointed out:

> Once a court concludes that the performance and costumes of female attendants in bars and taverns can be regulated only within the First Amendment limits upon the powers of the government to regulate speech, there is no limit but obscenity, whatever that is. *City of Portland v. Derrington, supra.* Neither the state nor the United States Constitution requires such a construction

that would limit the legislative function of city government to this extent. In cases of this nature, the court must look to the substance of the regulation and ask whether the elements of communication which may be present in the regulated conduct are significant enough to bring the entire course of conduct under the protective mantle of the First Amendment. *Schneider v. State*, 308 U.S. 147; 60 S.Ct. 146.

When nudity is employed as a sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. . . .

The question is not one of legislative wisdom but one of constitutional power. The chief aim of the ordinance is to regulate conduct deemed by the lawmakers to be injurious to health, safety and morals. The city's legislative judgment in the matter should be upheld unless the statute unreasonably impinges upon those elements of communication which may be incidental to the regulated conduct. We do not believe the interference with communication in the case at bar has enough substance to present a First Amendment question.

Similarly in *State v. Brown*, 165 Ohio St. 31, 59 Ohio Cps. 45, 133 N.E.2d 333 at 335 (appeal dismissed 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d ..... the Court held valid a statute prohibiting nudist camps.

In *People v. Glassey*, unreported, Crim. A 2256 (*Cert. den.* 332 U.S. 790, 68 S.Ct. 99, 92 L.Ed. 372, Oct. 20, 1947), the Appellate Department of the Su-

perior Court of the County of Los Angeles held valid as against objections similar to those of the Petitioner, an ordinance of the City of Los Angeles prohibiting conducting any camp where three or more persons not all of the same sex are permitted or allowed to commingle in the nude.

Pertinent to the denial of certiorari in the above cases and in *Evans Theater, supra*, is the statement in *United States v. Musselshell State Bank*, 60 F.2d 157 at 159:

> While the denial of a writ of certiorari, imports no expression of opinion upon the merits, it is a circumstance that may well have thoughtful consideration, in connection with other related questions.

Finally, Respondent submits that this case parallels that of *Hoffman v. Carson*, 250 So.2d 891 appeal dismissed by This Honorable Court on December 7, 1971, "for lack of a federal question." In that case the Florida Court considered and found constitutionally valid the application of an indecent exposure statute to a naked beer bar dancer. In rejecting the defendant's claim of constitutional invalidity that court aptly stated:

> Appellant loses sight of the distinction between speech and conduct. The statute is not directed at First Amendment rights of free expression, nor does it concern itself with obscenity as does Fla. Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law [*e. g. Commonwealth v. Broadland*, 315 Mass. 20, 51 N.E.2d 961 (1943); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241

(1952)], and generally considered as having a reasonable relationship to the public welfare; and, therefore, within the police power of the Legislature.

Accordingly, and for all the above reasons, Respondent respectfully urges This Honorable Court to deny the Petition for Certiorari.

Dated this 17th day of February, 1972.

Respectfully submitted,

CECIL HICKS,
District Attorney, County of Orange,
State of California,

MICHAEL R. CAPIZZI,
Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,

Attorneys for Respondent.

ATTACHMENT A.

A Stipulation for Entry of Decree of Permanent Injunction; Order Thereon.

Kent G. Snyder
Attorney at Law
1010 North Main Street, Suite 515
Santa Ana, California 92701
(714) 547-7408
Attorney for Defendant

Superior Court of the State of California, for the County of Orange.

The People of the State of California, Plaintiff, vs. Vampire Room, Conchita Escobar, et al. Defendants. No. 166 675.

IT IS HEREBY STIPULATED AND AGREED by and between the people of the State of California, plaintiff, in the above entitled action, and by CONCHITA ESCOBAR, dba THE VAMPIRE ROOM, defendant in the above entitled action, by and through their respective attorneys, that the people of the State of California shall be awarded a permanent injunction to abate the nuisance described in the complaint on file herein.

IT IS FURTHER STIPULATED AND AGREED between the above named parties that an Order may be entered against CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, enjoining and restraining them from conducting or permitted to be conducted within said establishment as a part of the business operations so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and

exhibitions where the performer's genitalia and anus and pubic hair region whether real or simulated are not completely covered by a material which cannot be seen through by the nearest spectator.

IT IS FURTHER STIPULATED AND AGREED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

IT IS FURTHER STIPULATED AND AGREED that except as hereinabove stipulated all other relief prayed for by the complaint is hereby dismissed by the plaintiff.

DATED: June 27, 1969

/s/ Michael R. Capizzi, Deputy
CECIL HICKS, District Attorney of the County of Orange, State of California.
Attorney for Plaintiff

APPROVED:

/s/ Conchita Escobar
CONCHITA ESCOBAR

/s/ Kent G. Snyder,
KENT G. SNYDER, Attorney for Defendant, Conchita Escobar, dba The Vampire Room

Order.

GOOD CAUSE APPEARING THEREFORE:

IT IS HEREBY ORDERED that CONCHITA ESCOBAR, as well as all other managers and operators of the defendant establishment, are permanently enjoined and restrained from conducting or permitted to be conducted therein as a part of the business operations the so-called bottomless performances, which, more specifically, means any and all sexually provocative dances and exhibitions where the performer's genitalia, anus and pubic hair region whether real or simulated are not completely covered by material which cannot be seen through by the nearest spectator.

IT IS FURTHER ORDERED that all managers and operators of the above establishment are enjoined and restrained from conducting or permitting to be conducted therein, any activity wherein persons are allowed or permitted to make physical contact with the performer's pubic area or breasts in real or simulated sexual activity.

DATED: 6-27, 1969

CLAUDE M. OWENS
JUDGE OF THE SUPERIOR COURT

ATTACHMENT B.

Order on Stipulation.

Kent G. Snyder
Attorney at Law
1010 North Main Street, Suite 515
Santa Ana, California 92701
(714) 547-7408
Attorney for Defendant

Superior Court of the State of California, for the County of Orange.

The People of the State of California, Plaintiff, vs. Vampire Room, Conchita Escobar, et al, Defendants. No. 166 675.

The above entitled matter came on for hearing at 9:00 a.m., June 27, 1969, in Department 2 of the above entitled court, the Honorable Claude M. Owens, Judge Presiding, plaintiff, the People of the State of California being represented by Deputy District Attorney Michael Capizzi, and the defendant, Conchita Escobar, being present in court and being represented by her attorney, Kent G. Snyder, and having entered into a stipulation, and the Court having considered the stipulation;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the complaint on file in the above captioned action be dismissed as to all matters as to the defendants James T. and Lorraine E. Robinson and Gordon S. and Helen J. Moen; and

2. That as to the defendant, Conchita Escobar, dba The Vampire Room, that the relief prayed for in paragraph 1 of the prayer found on page 3 of the com-

plaint from line 18 to and including line 24 and paragraph 6 of the prayer of the complaint found on page 4 thereof from line 23 to and including line 32 be dismissed as to said defendant.

Dated: 7-3-'69

CLAUDE M. OWENS
Judge of the Superior Court

APPROVED AS TO FORM
Michael R. Capizzi,
Deputy District Attorney,
County of Orange, State of California
Attorney for Plaintiff

/s/ Kent G. Snyder
Kent G. Snyder
Attorney for defendant
CONCHITA ESCOBAR